ROB BONTA
Attorney General of California
ANTHONY R. HAKL
Supervising Deputy Attorney General
ANNA FERRARI, SBN 261579
GABRIELLE D. BOUTIN, SBN 267308
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-6053
Fax: (916) 324-8835
E-mail:
Gabrielle.Boutin@doj.ca.gov
Attorneys for Defendant Attorney General Rob Bonta, in his official capacity

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

X CORP., Plaintiff, **v.** **ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, IN HIS OFFICIAL CAPACITY,** Defendant.	2:23-CV-01939-WBS-AC **DEFENDANT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** Date: November 13, 2023 Time: 1:30 p.m. Dept: 5 Judge: Hon. William B. Shubbbb Trial Date: None set Action Filed: 9/08/2023

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INTRODUCTION

AB 587 requires Plaintiff and other large social media platforms to make factual disclosures in two forms: 1) by posting the platform's terms of service for users (Cal. Bus. & Prof. Code § 22676), and 2) by submitting to the Attorney General, for public posting, a bi-annual "terms of service report" (*id.* § 22677). Under AB 587, the terms of service report is to include certain types of information about the platform's terms of service and content moderation practices. *Id.* At the November 13, 2023 hearing on Plaintiff's motion for preliminary injunction, the Court asked the parties to submit supplemental briefs that address the proper standard of review for determining if the required disclosures in the terms of service report violate the First Amendment. Defendant respectfully submits this supplemental brief in response to that request.

The answer to the Court's query is that *Zauderer* scrutiny applies to the required disclosures in the terms of service report. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). *Zauderer* scrutiny applies to laws compelling (1) commercial speech, (2) that is "purely factual and uncontroversial." *Nat'l Wheat Growers Assn. v. Bonta*, ---F.4th---, No. 20-16753, 2023 WL 7314307 (9th Cir. Nov. 7, 2023), at *10. ("*Nat'l Wheat*").

Here, the terms of service report requirements compel commercial speech because they compel businesses (social media companies) to make factual disclosures to consumers about their services (their online platforms). In these circumstances, courts generally do not apply the *Bolger* factors or the test for

whether the communication "does not more than propose a transaction." Nor is *Zauderer* scrutiny "limited to restrictions on advertising and point-of-sale labeling." *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020).

The information in required in terms of service reports is "purely factual," because it consists only of facts about a social media company's voluntary, existing terms of service and its actual content moderation conduct. The information is "uncontroversial" under establish Ninth Circuit precedent, because it relates only to a company's own services and does not require a company to take any position fundamentally at odds with its mission. For these reasons, AB 587's terms of service report requirements are subject to *Zauderer* scrutiny.

AB 587'S TERMS OF SERVICE REPORT REQUIREMENTS[1]

AB 587 provides that, commencing January 1, 2024, social media companies subject to the law must submit to the Attorney General a semiannual "terms of service report" containing specified factual information. Cal. Bus. & Prof. Code § 22677(a)-(b).

The reports must include the "current version of the platform's terms of service" and a "detailed description of

[1] This brief refers to the report "requirements" because the various requirements are set forth in separate provisions of California Business and Professions Code section 22677 and are severable. Thus, even if this Court were to find that one subdivision of section 22677 is likely unconstitutional, it should not preliminarily enjoin any other requirements of the statute. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) ("an injunction must be narrowly tailored to give only the relief to which plaintiffs are entitled"); *see also Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (an injunction "must be tailored to remedy the specific harm alleged").

content moderation practices used by the social media company ….” *Id.* § 22677(a)(1), (a)(4). The reports must also include a statement of simply “whether” the current version of the terms of service define several categories of content enumerated in the statute and, if so, the definitions of those categories, and “any existing policies intended to address the categories.” *Id.* § 22677(a)(3), (a)(4)(A). The reports must also include specified “information on content that was flagged by the social media company as content belonging to any of the [enumerated] categories.” *Id.* § 22676(a)(5).

AB 587 does not direct the Attorney General to take any action in response to submitted reports other than to “make all terms of service reports submitted pursuant to this section available to the public in a searchable repository on its official internet website.” *Id.* § 22676(c).

ARGUMENT

I. AB 587’s Terms of Service Report Requirements Are Subject to *Zauderer* Scrutiny

Zauderer scrutiny applies to laws compelling commercial speech that is “purely factual and uncontroversial.” *Nat’l Wheat Growers Assn. v. Bonta* --- F.4th ---, No. 20-16753, 2023 WL 7314307 (9th Cir. Nov. 7, 2023), at *10. (“*Nat’l Wheat*”). *Zauderer* and its progeny reflect the unexceptional principle that “[t]he First Amendment does not generally protect corporations from being required to tell prospective customers the truth.” *Nationwide Biweekly Admin. v. Owen*, 873 F.3d 716, 721 (9th Cir. 2017).

Zauderer scrutiny applies to the terms of service report requirements because, as explained below, the compelled speech is "commercial" and "purely factual and uncontroversial information." *Nat'l Wheat*, 2023 WL 7314307, at *10; *see also NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1230 (11th Cir. 2022), *cert. granted in part sub. nom. Moody v. NetChoice*, --- S.Ct. ----, 2023 WL 6319654 (*"NetChoice (Fla.)"*) (applying *Zauderer* scrutiny to compelled disclosures regarding platforms' terms of service and related information; *NetChoice, LLC v. Paxton*, 49 F.4th 439, 485 (5th Cir. 2022), *cert. granted in part*, --- S.Ct. ----, 2023 WL 6319650 (*"NetChoice (Tex.)"*) (applying *Zauderer* scrutiny to compelled disclosures regarding information on platforms' terms of service and content moderation practices).

A. The Terms of Service Report Requirements Compel "Commercial Speech"

1. The determination of whether a communication is "commercial speech" is fact-driven.

Courts are "loath to identify a strict test" for commercial speech. *Alfasigma USA, Inc. v. First Databank, Inc.*, 398 F. Supp. 3d 578, 586 (N.D. Cal. 2019). "Commercial speech is 'usually defined as speech that does no more than propose a commercial transaction.'" *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)). However this definition defines only the "core notion" of commercial speech – other communications may also constitute commercial speech. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (7th Cir. 2014) (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983)). Courts therefore view this definition as "just a

starting point" of the commercial speech analysis. *Id.*; *accord Ariix*, 985 F.3d at 1115. The full analysis "is fact-driven, due to the inherent difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017) (internal quotation marks omitted); *accord Ariix*, 985 F.3d at 1115.

"Because of the difficulty of drawing clear lines between commercial and non-commercial speech, the Supreme Court in *Bolger* outlined three factors to consider." *Ariix*, 985 F.3d at 1115; *see Bolger*, 463 U.S. at 66-67. These are whether [1] the speech is an advertisement, [2] the speech refers to a particular product, and [3] the speaker has an economic motivation." *Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011) (citing *Bolger*, 463 U.S. at 66–67). "These so-called *Bolger* factors are important guideposts, but they are not dispositive." *Ariix*, 985 F.3d at 1116.

2. In the compelled speech context, consumer product and service disclosures are treated as "commercial speech" for the purposes of applying *Zauderer* scrutiny

If a law compels a business to make consumer disclosures regarding a product or service, courts generally treat this as sufficient to meet *Zauderer*'s commercial speech requirement. In these cases, courts do not strictly apply the *Bolger* factors or the "do no more than propose a commercial transaction" test, and often do not apply them at all. This is logical because, while businesses' government-compelled product or service disclosures to consumers are commercial in nature, they do not "propose a

commercial transaction" (*United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)), they often do not appear in advertisements (*see Bolger*, 463 U.S. at 66–67), and the businesses certainly do not have an economic motivation to make them (*see id.*).

The cases below illustrate this rule.

In *National Inst. of Family and Life Advocates v. Becerra*, the Supreme Court considered a California law requiring licensed pregnancy-related clinics to disclose information about certain state-sponsored medical services, including abortion. 138 S.Ct. 2361, 2369-70. The Court applied *Zauderer* scrutiny to the law without considering whether or not the speech it compelled was commercial. *See id.* at 2372.

In *CTIA – The Wireless Association v. City of Berkeley, Cal.*, a city ordinance required cell phone retailers to provide a notice to customers about cell phone radiation. 928 F.3d 832, 843 (9th Cir. 2019). The Ninth Circuit applied *Zauderer* scrutiny since the parties agreed that the compelled speech was commercial and the court did not disagree. *Id.* at 841-42; *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001) (applying *Zauderer* scrutiny where plaintiff did not dispute that labeling requirement for mercury-containing products involved commercial speech and court did not disagree).

In *Nat'l Assn. of Wheat Growers v. Bonta*, the Ninth Circuit considered a challenge to California's Proposition 65 requirement that businesses provide a "clear and reasonable warning" to persons exposed to a particular chemical. --- F.4th. --- (9th Cir. Nov. 7, 2023), 2023 WL 7314307 at *2. Again, the Ninth Circuit applied *Zauderer* scrutiny to the State's proposed warning

language without any explicit consideration of whether the law compelled commercial speech. *Id.* at *10-15; *see also Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 21 (D.C. Cir. 2014) (proceeding directly to *Zauderer* scrutiny of law requiring country-of-origin labeling for meat products without explicit consideration of whether law compelled commercial speech).

Finally, in *NetChoice (Fla.)* and *NetChoice (Tex.)*, like here, the circuit courts considered state laws requiring social media platforms to make certain disclosures regarding content moderation policies and practices. *NetChoice (Fla.)*, 34 F.4th at 1206-07; *NetChoice (Tex.)*, 49 F.4th at 445-46. In both cases, the circuit courts applied *Zauderer* scrutiny to the disclosure laws without discussing whether the compelled speech was "commercial." *NetChoice (Fla.)*, 34 F.4th at 1230; *NetChoice (Tex.)*, 49 F.4th at 485.

In contrast with the cases above, Plaintiff has cited no Supreme Court or Ninth Circuit case—and Defendant is aware of none—in which a court has invalidated a consumer product or service disclosure law because the law did not "propose a commercial transaction" or satisfy the *Bolger* factors. At the hearing on this motion, Plaintiff did cite the Southern District of New York case of *Volokh v. James*, No. 22-CV-10195 (ALC), 2023 WL 1991435, at *7 (S.D.N.Y. Feb. 14, 2023). There, the challenged law required social media platforms to both have and disclose a policy regarding hate speech. *Id.* at 2. Although the court concluded that the compelled speech was not commercial, it did not engage in a "fact-driven" analysis (*First Resort, Inc.*, 860 F.3d at 1272) or even apply the *Bolger* factors. *Volokh* at

*7. As the other cases above indicate, the mode of analysis and conclusion in *Volokh* is out of step with Ninth Circuit authorities and, in any event, not binding here.

3. The terms of service report requirements compel "commercial speech" because they compel disclosures to consumers about the social media platform's commercial services.

AB 587's terms of service report requirements compel the same type of product or service disclosure to consumers that courts subject to *Zauderer* scrutiny as commercial speech. The terms of service reports disclose the social media platform's terms of service, information on the platform's content moderation practices, and, in some cases, high-level statistics about categories of content that the company actually flagged as violating their terms of service. Cal. Bus. & Prof. Code §22677(a). AB 587 requires that the Attorney General must "make all terms of service reports submitted pursuant to this section available to the public in a searchable repository on its official internet website." *Id.* § 22676(c). In other words, the terms of service reports require businesses (large social media platforms) to disclose facts about how their own commercial

services function.[2] And, the reports are then made available, in full, to the public that uses these services. Under case law precedent, the terms of service reports are precisely the type of compelled consumer disclosure that constitutes commercial speech.

It is immaterial to the commercial speech analysis that AB 587 requires platforms to transmit the terms of service reports to the Attorney General rather than directly to individual platform users. The purpose of requiring disclosure to the Attorney General in the first instance is so the Attorney General can compile the reports and make the information searchable and widely available to the public. Moreover, case law supports the application of *Zauderer* scrutiny where compelled disclosures are made to the public or to the government, instead of directly to a specific individual at the point of sale. *See Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020) (*Zauderer* scrutiny is "not limited to restrictions on advertising and point-of-sale labeling"); *see also Ariix*, 985 F.3d at 1116 (a publication that is "not in a traditional advertising format but that still refers to a specific product" can be commercial speech).

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[2] Plaintiff's terms of service expressly state that they are part of a "legally binding contract" between X Corp. and its users. *See* X Terms of Service, https://twitter.com/en/tos (last visited Nov. 20, 2023). And, in cases between users and online platforms, the terms of service have been treated as enforceable contracts. *See, e.g., Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 913 (N.D. Cal. 2011) (ruling that user's assent to arbitration clause in platform's terms of service was binding) *See King v. Facebook, Inc.*, 572 F.Supp.3d 776, 790 (2021) (ruling that Facebook user had stated a cognizable claim for breach of contract claim based on Facebook's terms of service); *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024, 1038 (N.D. Cal. 2019) (ruling that limitation-of-liability provision in terms of service precluded user's breach of contract claims against Facebook).

For example, courts have applied *Zauderer* to laws compelling companies to post their product or service disclosures on the internet, even though they did not provide their products or services primarily over the internet. *See, e.g., Am. Hosp. Ass'n*, 983 F.3d at 540-41 (applying *Zauderer* to 42 U.S.C. § 300gg-18(e), which requires hospitals to post on the internet a list of their standard prices for offered services)[3]; *United States v. Philip Morris*, 855 F.3d 321, 323, 327-28 (D.C. Cir. 2017) (applying *Zauderer* to compelled statements regarding smoking and health matters on tobacco company's website). In *Env't Def. Ctr., Inc. v. U.S. E.P.A.*, the Ninth Circuit invoked *Zauderer* while rejecting a First Amendment challenge to a law that generally required municipalities to "distribute educational materials" and "inform" the public regarding storm water sewer hazards. 344 F.3d 832, 848-50 (9th Cir. 2003). And, in *Chamber of Com. of United States v. United States Sec. & Exch. Comm'n*, the court applied *Zauderer* to a regulation that required companies that repurchased their own shares to submit a report to the Securities and Exchange Commission explaining the rationale for the repurchase. No. 23-60255, 2023 WL 7147273, at *3 (5th

[3] Section 300gg-18(e) requires hospitals to make the lists "public" as required by federal regulation. 42 U.S.C. § 300gg-18. Federal regulation requires hospitals to make the list public by posting them on the internet. *See* Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2019 Rates; Quality Reporting Requirements for Specific Providers; Medicare and Medicaid Electronic Health Record (EHR) Incentive Programs (Promoting Interoperability Programs) Requirements for Eligible Hospitals, Critical Access Hospitals, and Eligible Professionals; Medicare Cost Reporting Requirements; and Physician Certification and Recertification of Claims, 83 FR 41144-01, 41686 (Aug. 17, 2018).

Cir. Oct. 31, 2023).[4]

The terms of service reports therefore fit comfortably in a long line of cases treating product or service disclosures, made directly or indirectly to consumers, as commercial speech subject to *Zauderer* scrutiny.

4. The commercial speech in the terms of service reports is not "inextricably intertwined" with noncommercial speech

Plaintiff argues that the terms of service reports requirements are subject to strict scrutiny, because even if the compelled disclosures are commercial speech, they are "inextricably intertwined" with noncommercial speech. Mtn. at 56, n.12. However, "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Bolger*, 463 U.S. at 68 (quoting *Central Hudson*, 447 U.S. at 563, n.5).

Here, the terms of service report requirements compel only commercial disclosures about Plaintiff's commercial service. The requirements do not compel any political message. Plaintiff argues that "the topics on which AB 587 forces X Corp. to take a position are core political speech." Mtn. at 64, n.12. However, Plaintiff fails to identify how any provision of the terms of service report requirements (or any part of AB 587) forces Plaintiff to take a position on any political topic. Plaintiff is only required to disclose its own definitions of content

[4] *See also* Brief of Respondent Securities and Exchange Commission at 1, *Chamber of Commerce of the United States of America v. S.E.C.*, 2023 WL 5274579 (5th Cir. Aug. 9, 2023) (summarizing the S.E.C. rule); Purchases of equity securities by the issuer and affiliated purchasers, 17 C.F.R. § 229.703 (2023).

categories that Plaintiff has already voluntarily elected to publicly define in its terms of service. Cal. Bus. & Prof. Code § 22677(a)(2) (requiring a "statement of *whether* the current version of the terms of service defines each of the following categories of content and, *if so*, the definitions of those categories" (emphasis added)). The statute's provision requiring "[i]nformation on content that was flagged by the social media company as content belonging to any of the categories" also does not force Plaintiff to take a position on any political topic. It merely requires Plaintiff to report statistics about actions it has taken based on its own policies. *Id.* § 22677(a)(5).

Plaintiff has also argued that the terms of service report requirements compel Plaintiff to "convey information about issues of public concern – namely, how X Corp. moderates controversial content on its social media platform." Reply Br., ECF No. 25, at 11-12. Even if this were so, it means that the disclosures only "link[] [Plaintiff's] product to a current debate" regarding how social media platforms moderate content. *Bolger*, 463 U.S. at 68. This mere link does not confer the disclosures with the constitutional protection afforded noncommercial speech. *Id.*

The terms of service report disclosures are commercial speech only, and are not "inextricably intertwined" with noncommercial speech.[5]

[5] Plaintiff also asserts that information on "how it applies" definitions of controversial categories "in specific cases" carries a political message. Reply, ECF No. 25, at 16. However, AB 587 does not require the disclosure of any information related to particular posts. *See* Cal Bus. & Prof. Code §§ 22676, 22677.

B. The Terms of Service Report Disclosures Are "Purely Factual and Uncontroversial"

AB 587's terms of service report requirements are also subject to *Zauderer* scrutiny because they compel only speech that is "purely factual and uncontroversial." *Nat'l Wheat*, No. 20-16753, at *10.

In Plaintiff's motion, the only terms of service report requirements that it argues are not purely factual and uncontroversial are those related to the statute's specified categories of content ("disinformation," "hate speech," etc.). See Mtn. at 65-67; *see* Cal. Bus. & Prof. Code §§ 22677(a)(3), (5)(B)(1). But those provisions require the disclosure of purely factual information; they merely require companies to disclose whether their terms of service "define" specified categories of content (and what those definitions are) (*id.* § 22677(a)(3)) and "[i]nformation on content that was flagged by the social media company as content belonging to any of" those categories (*id.* § 22677(a)(5)(A) (emphasis added).[6] This is purely factual information about the company's actual policies and actual conduct, whose accuracy is not subject to reasonable dispute. If a social media company's

[6] Plaintiff suggested at the hearing that compliance with section 22677(a)(5)(A) may require Plaintiff to exercise subjective judgments because the statute's content categories may overlap with the categories that Plaintiff actually utilizes. However, section 22677(a)(5)(A) does not require Plaintiff to report statistical information about flagged content that merely might fall into one of the statute's categories. It only requires information about content that Plaintiff actually flagged "as" content belonging in the statutory categories. In other words, the disclosure relates to Plaintiff's factual prior conduct of identifying (and flagging) content as belonging to the categories.

terms of service do not define the categories listed in AB 587 in its terms of service, its report to the Attorney General would simply disclose that fact. Likewise, if a social media company does not moderate—or "flag"—according to those categories, it will have no numerical data on that subject to include its report. *See id*.

The category-related terms of service report requirements are also uncontroversial. For the purposes of determining whether to apply *Zauderer* scrutiny, the Ninth Circuit has defined "uncontroversial" to mean that the compelled speech: (1) "relate[s] to the product or service that is provided by an entity subject to the requirement"; and, (2) does not force the speaker to "convey a message fundamentally at odds with its mission." *CTIA*, 928 F.3d at 845; *accord Nat'l Wheat*, No. 20-16753, at *12. If these requirements are met, a disclosure is "uncontroversial" even if it "can be tied in some way to a controversial issue," and even if the disclosure may be used by others to support arguments "in a heated political controversy." *CTIA*, 928 F.3d at 845.[7]

The speech compelled by the statute's category-related provisions meet both prongs of this test. The speech relates to

[7] In *Nat'l Wheat,* the Ninth Circuit added that "an objective evaluation of 'controversy' is also an important consideration." *Nat'l Wheat*, No. 20-16753, at *12. However, the brief subsequent discussion indicates that the court was referring to whether there is actually controversy about the factual accuracy of the speech. *Id.* Here, the terms of service report requirements only require social media platforms to disclose accurate facts about their actual, existing content moderation policies and practices. Even if the Court also meant that courts should evaluate whether there is actually a public controversy over the speech's subject matter, the Court did not suggest that this alone would be sufficient to establish that the speech was "controversial" and not subject to *Zauderer*.

Plaintiff's own product or services, because it provides information about how Plaintiff's own social media platform works. The provisions also do not force Plaintiff to "convey a message fundamentally at odds with its mission." *Id*. To the contrary, the provisions simply require the disclosure of information regarding Plaintiff's own choices about how its commercial service should function. It is hard to imagine how such information might be inconsistent with Plaintiff's own mission. Surely Plaintiff is not arguing that its voluntary business choices are fundamentally at odds with its own mission.

The terms of service report requirements are subject to *Zauderer* scrutiny because they compel only commercial speech that is "purely factual and uncontroversial." *Nat'l Wheat*, No. 20-16753, at *10.

II. EVEN IF *ZAUDERER* SCRUTINY DOES NOT APPLY TO THE TERMS OF SERVICE REPORT REQUIREMENTS, *CENTRAL HUDSON* INTERMEDIATE SCRUTINY APPLIES

Even if AB 587's terms of service report requirements did not qualify for *Zauderer* scrutiny, they would still be subject only to the *Central Hudson* intermediate scrutiny test for commercial speech. Under circumstances similar to those here, the Ninth Circuit and this Court already have concluded as much. *See Nat'l Wheat*, 2023 WL 7314307, at *10 (applying *Central Hudson* scrutiny after concluding that the challenged disclosure requirements did not compel purely factual and uncontroversial speech under *Zauderer*); *see also Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1258 (E.D. Cal. 2020) (same) (citing *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2372 (2018) ("*NIFLA*") (internal quotation omitted)); *see*

also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 564 (1980).

III. THE TERMS OF SERVICE REPORT REQUIREMENTS ARE NOT SUBJECT STRICT SCRUTINY

A. Strict Scrutiny Does Not Apply to Content-Based Laws Compelling Commercial Speech

AB 587's terms of service report requirements require large social media platforms to disclose specified types of factual information. Even if this renders the requirements "content-based" to some degree, content-based restrictions are "not necessarily subject to strict scrutiny." *United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016).

Generally, some content-based speech regulations implicating the First Amendment are subject to strict scrutiny. However, as the Supreme Court explained in *NIFLA*, *Zauderer* set forth an exception to this rule for content-based regulations that compel commercial speech. *NIFLA*, 138 S. Ct. at 2365-66 (citing *Zauderer*, 471 U.S. at 651). Thus, content-based regulations that qualify for *Zauderer* scrutiny are not subject to strict scrutiny. *See id.* The Ninth Circuit also has expressly concluded that strict scrutiny does not apply to all content-based compelled disclosures, and that an exception applies when *Zauderer* or *Central Hudson* scrutiny is appropriate. *See Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732 (9th Cir. 2017). Other courts have reached the same conclusion. *See, e.g., Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 283 (4th Cir. 2013) ("While the strict scrutiny standard generally applies to content-based regulations, including compelled speech, less-demanding standards

apply where the speech at issue is commercial" (internal citation omitted)); *S.E.C. v. AT&T, Inc.*, 626 F. Supp. 3d 703, 743 (S.D.N.Y. 2022) ("But defendants' suggestion that all content-based regulations must satisfy strict scrutiny overlooks the significant body of decisions involving laws and regulations mandating affirmative disclosures of information").

Indeed, regulations compelling speech are usually content-based by definition, because they set forth some category of information that must be spoken—and *Zauderer* scrutiny is applied in those cases. *See, e.g., Zauderer*, 471 U.S. at 652 (attorney advertisements required to disclose that clients may be responsible for litigation costs); *CTIA*, 928 F.3d at 837-38 (cell phone retailers required to inform prospective purchasers about cell phone radiation); *Am. Beverage Ass'n v. City and County of San Francisco*, 916 F.3d 749, 753 (9th Cir. 2019) (health warnings required in advertisements for certain sugar-sweetened beverages).

Plaintiff, on the other hand, offers no authorities supporting the argument that compelled commercial disclosure requirements are subject to strict scrutiny merely because they are "content-based." Although Plaintiff has cited *Reed* and *City of Austin* for the proposition that all content-based regulations are necessarily subject to strict scrutiny, those case involved restricted speech not compelled speech. Mtn., ECF No. 20, at 56-57; *see Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 159 (2015); *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 64-65 (2022).

Here the terms of service report requirements compel commercial speech that is subject to *Zauderer* scrutiny (or, at most, *Central Hudson* scrutiny), and are therefore not subject to strict scrutiny merely because they may be content-based to some degree.

B. The Terms of Service Report Requirements Are Viewpoint Neutral

The terms of service report requirements are also not subject to strict scrutiny as viewpoint discriminatory, because the requirements are viewpoint neutral. "A regulation engages in viewpoint discrimination when it regulates speech 'based on 'the specific motivating ideology or perspective of the speaker.' " *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017) (quoting *Reed*, 576 U.S. at 168).

The terms of service report requirements are facially viewpoint neutral. Although the requirements direct companies to provide certain types of information, the requirements do not mandate that the disclosed information include any particular message or substance. In other words, the requirements do not impose any terms of service or content regulation policies or outcomes on any social media platform. They merely require companies to disclose the policies and practices that they have actually and voluntarily put into place.

AB 587's terms of service report requirements in AB 587 therefore materially differ from the challenged law in *Volokh*, 2023 WL 1991435. *See* Mtn. at 53. There, the law required platforms to implement hate speech policies which put plaintiffs "in the incongruous position of stating that they promote an

explicit pro-free speech ethos, but also require[d] them to enact a policy allowing users to complain about 'hateful conduct' as defined by the state." *Id.* at *7. The court concluded that the compelled speech was therefore partly political in nature and that strict scrutiny was therefore appropriate." *Id.* In contrast here, AB 587's terms of service report requirements merely require Plaintiff to disclose factual information about its own voluntary, existing content moderation policy practices. The requirements do not require Plaintiff to adopt or communicate anything else, much less promote a particular ethos.

Where, as here, a law is facially neutral, a court "will not look beyond its text to investigate a possible viewpoint-discriminatory motive." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018). A court may only turn to the legislative history and other extrinsic evidence of legislative intent if the law includes "indicia of discriminatory motive." *Id.* The court here therefore need not, and should not, look beyond AB 587's text to conclude that it is not viewpoint-discriminatory.

Even if the Court were to consider legislative history, however, it would reach the same conclusion. Courts "assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [the courts] to conclude that they could not have been a goal of the legislature." *Am. Fuel & Petrochem. Mfrs. v. O'Keefe*, 903 F.3d 903, 912 (9th Cir. 2018). As the Legislature put it, AB 587 is, "[i]n essence . . . a transparency measure." Boutin Dec., ECF No. 24-1, Ex. 2 at 4 (Assem. Judiciary Comm. Analysis). The

Legislature's express purpose in enacting the bill was "to increase transparency around what terms of service social media companies are setting out and how it ensures those terms are abided by. The goal is to learn more about the methods of content moderation and how successful they are." *Id.*, Ex. 6 at 12 (Sen. Judiciary Comm. Analysis). And, the Governor's press release following enactment prominently referred to AB 587 in its title as a "social media transparency bill." *See* Mtn. at 69.

Plaintiff argues that the main purpose of AB 587 is to pressure social media platforms to eliminate certain types of speech on their platforms. Mtn. at 55-56. The Legislature was aware that, by requiring greater transparency about platforms' content-moderation rules and decisions, AB 587 may encourage—*though not require*—social media companies to "become better corporate citizens by doing more to eliminate hate speech and disinformation" on their platforms. Boutin Dec., Ex. 2 at 4 (Assem. Judiciary Comm. Analysis). But any *public* pressure from consumers that results from the factual disclosures does not equate to discriminatory treatment by the *state* through AB 587.

C. The "Editorial Judgments" Theory Does Not Apply to the Terms of Service Report Requirements

Plaintiff argues that the terms of service report requirements are subject to strict scrutiny based on a theory that the report interferes with Plaintiff's "editorial judgments about content." Mtn. at 46. This argument is unavailing here, just as it was in *NetChoice (Fla.)* and *NetChoice (Tex.)*, where both the Fifth and Eleventh Circuits held that the challenged disclosure statutes did not violate the First Amendment based on

the "editorial judgments" theory. *NetChoice (Fla.)*, 34 F.4th at 1233; *NetChoice (Tex.)*, 49 F.4th 487-88. Indeed, none of Plaintiffs' cited cases involve regulations compelling commercial speech and none even consider whether *Zauderer* should apply.

Herbert v. Lando is a defamation case that merely says, in dicta, that "[t]here is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed." 441 U.S. 153, 174 (1979). The Fifth Circuit explained in *NetChoice (Tex.)* why *Herbert* is distinguishable from social media transparency laws: "*Herbert* held that a defamation plaintiff could obtain discovery into the editorial processes that allegedly defamed him. And in the course of so holding, the Court rejected the editor's request to create 'a constitutional privilege foreclosing direct inquiry into the editorial process.'" *NetChoice (Tex.)*, 49 F.4th at 487 (quoting *Herbert*, 441 U.S. at 176) (internal citation omitted).

In *Miami Herald Pub. Co. v. Tornillo*, the Supreme Court ruled that a Florida statute violated the First Amendment by requiring a newspaper that criticized a political candidate to subsequently publish the candidate's response. 418 U.S. 241, 244 (1974); *see* Mtn. at 47. The Court reasoned that, under the First Amendment, the state could not compel a newspaper to publish political speech that it disagreed with. *Id.* at 256; *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (*Miami Herald* "rests on the principle that the State cannot tell a newspaper

what it must print"). Here, AB 587's terms of service report requirements do not tell Plaintiff what noncommercial content to publish or not to publish. The law merely requires Plaintiff to report factual information about its terms of service and content moderation practices.

Washington Post v. McManus is also distinguishable. *See* 944 F.3d 506 (4th Cir. 2019); *see also Paxton*, 49 F.4th at 488, n.38. That case involved burdensome campaign finance regulations of political speech. *Id.* at 510-12. Specifically, for every political ad posted by an online platform (including news outlets), the law required the platform to also post on its site "the identity of the purchaser, the individuals exercising control over the purchaser, and the total amount paid for the ad." *Id.* at 511. It also required platforms to collect and retain records regarding the political ad purchasers, which were subject to state inspection. *Id.* at 512. While expressly noting the narrowness of its ruling (*id.* at 513), the court emphasized that the regulatory scheme was unconstitutional, in large part, because it singled out political speech—"campaign-related speech"—for regulation. *Id.* at 513-14. It also emphasized that the law implicated constitutional protections for anonymous political speech (*id.* at 515) and that noncompliance would result in an injunction to remove the political ad and, failing that, criminal penalties (*id.* at 514).

The terms of service report requirements do not implicate these concerns. The requirements do not require social media platforms to respond to political content on the platforms and they do not give the government unlimited power to inspect

Plaintiff's records in connection with particular political content on its site. And, unlike the challenged law in *Washington Post*, AB 587 does not provide any penalties based on the content on the platform, much less criminal penalties.

Because their cited cases are inapposite, Plaintiffs have failed to show the terms of service reports requirements are subject to strict scrutiny based upon the "editorial judgments" theory.

D. The Terms of Service Report Requirements Are Not Analogous to the Challenged Laws in Plaintiff's "Speech About Speech" Cases

The terms of service report requirements are also not subject to strict scrutiny as purportedly regulating "speech about speech." Mtn. at 54. Plaintiff's cited cases do not support the application of that theory here.

Smith v. People of the State of California, which predates *Zauderer*, did not involve compelled commercial speech, but rather, an ordinance imposing strict criminal liability on booksellers for selling books containing obscene material. 361 U.S. 147, 148-49 (1959). The Court concluded that the statute would have the functional effect of banning books that were not obscene, and thus, constitutionally protected. *Id.* at 152. Here, the terms of service report requirements do not functionally require Plaintiff to change its terms of service or content moderation practices or restrict any content on its platform.

In both *Entertainment Software Ass'n v. Blagojevic*, 469 F.3d 641 (7th Cir. 2006) and *Motion Picture Ass'n of Am. v. Specter*, 315 F.Supp. 824 (E.D. Penn. 1970) the challenged laws were

invalidated not because they were "speech about speech," but because the laws compelled the expression of opinions rather than facts. In *Entertainment Software Ass'n*, the court concluded that "sexually explicit" video game labeling requirements did not qualify for *Zauderer* scrutiny because they required retailers to make disclosures that were subjective and "opinion-based" rather than purely factual and uncontroversial. 469 F.3d at 652. In *Motion Picture Ass'n of Am.*, which predated *Zauderer*, the court held that a state law violated the First Amendment where it criminalized a film exhibitor's misrepresentation that a film is "suitable for family viewing," because that standard was entirely subjective. 315 F.Supp. 824, 825-26 (E.D. Penn. 1970).

Here, the terms of service requirements qualify for *Zauderer* scrutiny, because the required disclosures are factual and uncontroversial, not subjective or opinion-based.

E. The Terms of Service Report Requirements Are Not Subject to Strict Scrutiny Based on Plaintiff's Unfounded Speculation That the Attorney General May Not Enforce AB 587 Properly

Finally, the terms of service report requirements are not subject to scrutiny merely because Plaintiff speculates, without meaningful evidence, that the Attorney General *might* attempt to use his generally-applicable investigatory powers to enforce AB 587 in a manner that violates Plaintiff's First Amendment rights.

The terms of service report requirements merely require Plaintiff to make factual disclosures. They do not purport to empower the Attorney General, or any other official, to undertake an unconstitutionally-intrusive investigation. Plaintiff complains that other provisions of AB 587 will permit the

Attorney General to investigate if Plaintiff's disclosures appear to contain material omissions or misrepresentations. *See* Cal. Bus. & Prof. Code § 22678. The proper procedure to address this concern, if necessary, is not to facially invalidate or subject the disclosure requirements themselves to strict scrutiny, but to bring an as-applied challenge to any investigatory action that Plaintiff believes violates the First Amendment. This avenue is not unduly burdensome to Plaintiff, a company that makes over $100 million in revenue every year.

The fact is that Plaintiff is not currently under investigation or under suspicion for noncompliance with AB 587, since its first terms of service report has not even come due. And, the November 3, 2022 letter from the Attorney General to numerous large social media companies does not support Plaintiff's speculation that the Attorney General plans to use AB 587 as a vehicle to conduct an unconstitutional investigation. *See* Exh. 1 to Fernandez Dec., ECF No. 18-3, at 1-2. The Attorney General sent the letter just prior to the 2022 midterm elections to encourage social media companies to "stop the spread of disinformation and misinformation that attack the integrity of our electoral processes." *Id.* at 2. The eight-page letter briefly mentions AB 587 once in a footnote. *Id.* at 4. The letter then understandably states that the Attorney General will enforce *all* of these laws. *Id.* Nowhere does the letter state that AB 587 would be enforced beyond the scope of its facial disclosure requirements.

CONCLUSION

AB 587's terms of service report requirements are subject to *Zauderer* scrutiny. As explained in earlier briefing and arguments, all of AB 587's challenged provisions satisfy *Zauderer* scrutiny, and *Central Hudson* scrutiny if the Court were to apply it. Plaintiff's motion for preliminary injunction should therefore be denied.

Dated: November 20, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
ANTHONY R. HAKL
Supervising Deputy Attorney General

/s/ Gabrielle D. Boutin
GABRIELLE D. BOUTIN
Deputy Attorney General
Attorneys for Attorney General Rob Bonta, in his official capacity